Sebsen Electrical Contractors LLC and Sebsen Electric LLC, a single employer *and* International Brotherhood of Electrical Workers, Local 915, AFL–CIO. Case 12–CA–243307

September 29, 2020

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge and amended charges filed by International Brotherhood of Electrical Workers, Local 915, AFL–CIO (the Union), on June 14, September 23, and October 17, 2019, respectively, the General Counsel issued a complaint on October 25, 2019, against Sebsen Electrical Contractors LLC (Respondent Contractors) and Sebsen Electric LLC (Respondent Electric), a single employer (collectively, the Respondent), alleging that it violated Section 8(a)(1) and (3) of the Act. On December 24, 2019, the Respondent filed an answer to the complaint.

Subsequently, the Respondent and the Union entered into a bilateral informal settlement agreement, which the Regional Director for Region 12 approved on February 24, 2020.[1] The settlement agreement required the Respondent to: (1) mail the approved notice to employees; (2) make whole employees Edward Polo De Castro and Terry Higgins by payment of backpay, plus interest and compensation for excess tax liability; (3) make whole Polo De Castro and Higgins by reimbursing the Union's Pension-Annuity Fund, with interest and liquidated damages;[2] (4) file with the Regional Director for Region 12 a report allocating the backpay awards for Polo De Castro and Higgins to the appropriate calendar years; and (5) remove from its files all references to the constructive discharges and terminations of employment of Polo De Castro and Higgins and notify each of them in writing that this has been done and that these actions will not be used against them in any way**.**

The settlement agreement also contained the following provision:

> The Charged Parties agree that in case of non-compliance with any of the terms of this Settlement Agreement by [] either of the Charged Parties, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the non-compliant Charged Parties, the Regional Director will reissue the complaint previously issued on October 25, 2019, in the instant case. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Parties understand and agree that the allegations of the aforementioned complaint will be deemed admitted and its Answer, as amended, to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Parties defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Parties on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon the Charged Parties/Respondent at the last address provided to the General Counsel.

By letter dated March 4, the Region's compliance assistant sent the Respondent a copy of the approved settlement agreement, with a cover letter explaining the remedial actions it was required to take in order to comply. Subsequently, the Respondent complied with the notice-mailing requirement and the expungement requirement. However, by email dated April 2, the Respondent notified the Region that it would not be able to make the payments to Polo De Castro, Higgins, or the Pension-Annuity Fund as required by the settlement agreement.

On April 9, the Regional Director, by letter and email, described the Respondent's failure to make the first installment payment required by the settlement agreement, and granted the Respondent an extension until May 8 to make the two installment payments to Polo De Castro, Higgins, and the Pension-Annuity Fund. The extension to May 8 constituted a 44-day extension for the first installment payments and a 14-day extension for the second installment payments. The Regional Director further informed the Respondent that if it failed to make the

[1] On this same date, the Regional Director issued an Order Withdrawing Complaint and Conditionally Approving Withdrawal of a Portion of the Charge. The withdrawal of a portion of the charge was based on a non-Board settlement regarding payments that the Respondent owed to various benefit funds. Complaint pars. 7(a) through (f), 8(a) through (j), 9(a) and (b), and 14 correspond to the withdrawn charge allegations.

All subsequent dates are in 2020 unless otherwise indicated.

[2] The payments to Polo De Castro, Higgins, and the Pension-Annuity Fund were to be made in two equal installments.

payments by May 8, the Region would proceed to reissue the October 25, 2019 complaint and move for default judgment.

The Respondent failed to make any payments by May 8. On May 11, the Respondent emailed the Region and stated that it was unable to make the required payments because its cashflow had been negatively impacted by the coronavirus pandemic. The Respondent asked if it could restructure the terms of the settlement agreement, whereby it would make a monthly payment of $2000 toward the amounts due pursuant to the settlement agreement and to the benefit funds pursuant to the non-Board agreement between the Respondent and the Union, with the Region and the Union determining how to allocate the $2000.

On June 1, the Region emailed the Respondent a letter stating that the Respondent must respond to an enclosed financial questionnaire by June 9 in order for the Region to consider the request for a payment plan. The Region further stated that it would reissue the complaint and move for default judgment if it was not satisfied with the Respondent's response, or if the Respondent and the Region could not promptly come to terms on an installment payment plan. By email dated June 9, the Respondent replied that it was not going to complete the financial questionnaire.

By email dated June 10, the Region informed the Respondent that it was willing to agree to a modified payment plan, but only if the Respondent demonstrated the need for such a plan by submitting the financial questionnaire. The Respondent's counsel replied that day, stating that the Respondent would provide a financial statement showing its losses and that it was providing the counsel with $2000, which the counsel would hold in trust pending an agreement with the Region. The Region replied that day, stating that it did not know if the Respondent's financial statement would be sufficient, but asking when it could expect to receive it. The Respondent did not reply.

On June 22, the Region emailed the Respondent's counsel, providing a deadline of June 24 for the Respondent to submit its financial documents. The Respondent failed to reply. Accordingly, pursuant to the terms of the noncompliance provision of the settlement agreement, on July 22, the General Counsel reissued the complaint.[3]

On July 28, the Respondent filed a motion to stay all proceedings and case activities, seeking a 6-month stay and requesting a status conference at the conclusion of the 6 months to assess the COVID-19 pandemic situation at that time. The Respondent submits that the pandemic has caused a significant decline in its business, resulting in a substantial depletion of its cash reserves. As such, the Respondent maintains that it is currently unable to complete the settlement payments, as well as being unable to assert its position effectively. Asserting that the Board has discretion to grant stays or continuances for good cause, the Respondent avers that a limited stay would not prejudice either party or the orderly administration of justice. Indeed, the Respondent submits, it has already complied with all aspects of the settlement except for the settlement payments, and thus the parties need only agree on a payment schedule that accounts for the Respondent's current financial situation. If a stay is not granted, however, the Respondent contends that it would be severely prejudiced because it does not currently have the resources to assist with the defense of this lawsuit. The Respondent further cites several cases in which courts have found good cause to extend certain deadlines during the COVID-19 pandemic, such as *Kleiman v. Wright*, No. 18-CV-80176, 2020 WL 1472087, at *2 (S.D. Fla. Mar. 26, 2020) (postponing depositions); *Garbutt v. Ocwen Loan Servicing, LLC*, No. 8:20-cv-136-T-36JSS, 2020 WL 1476159, at *2 (M.D. Fla. Mar. 26, 2020) (postponing discovery); and *Elsherif v. Clinic*, No. 18-cv-2998-DWF-KMM, 2020 WL 1441959, at *1 (D.Minn. Mar. 24, 2020) (postponing depositions). The Respondent also cites *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 2 (2020), in which the Board noted that the COVID-19 pandemic constitutes "compelling circumstances." Thus, the Respondent argues that it has shown good cause for the requested stay, and that an extension will not unduly delay the proceedings or cause prejudice to either party.[4]

On July 30, the General Counsel filed a Motion for Default Judgment and opposition to Respondent's motion to stay all proceedings and case activities with the Board. In his opposition to the Respondent's motion to stay, the General Counsel avers that much of the Respondent's argument appears to be directed to a court proceeding initiated by the Union and/or the Union's benefit funds to collect the amounts the Respondent owes pursuant to the non-Board settlement referenced above, and thus is inapplicable to the instant proceeding. The General Counsel further asserts that the Respondent has repeatedly claimed its inability to pay since April 2, only 38 days after executing the settlement agreement at issue, and that its arguments in this regard lack specificity and are unsupported by evidence. Moreover, the General Counsel contends, even assuming that the Respondent is unable to pay the settlement

[3] The reissued complaint does not include those portions of the original complaint that correspond to the charges that were withdrawn based on a non-Board settlement and pursuant to the Regional Director's order withdrawing complaint and conditionally approving withdrawal of a portion of the charge, issued on February 24.

[4] The Respondent notes that the Union's counsel has indicated that the Union opposes the relief sought.

amounts or to afford counsel, that is not a valid basis to stay the case and is irrelevant to the instant matter.

On August 5, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion for default judgment should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment and Motion to Stay

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to fully comply with the terms of the settlement agreement by failing to: (1) make whole employees Polo De Castro and Higgins by payment of backpay, plus interest and compensation for excess tax liability; (2) make whole Polo De Castro and Higgins by reimbursing the Union's Pension-Annuity Fund, with interest and liquidated damages; and (3) file with the Regional Director for Region 12 a report allocating the backpay awards for Polo De Castro and Higgins to the appropriate calendar years. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent's answer to the original complaint has been withdrawn and that all of the allegations in the reissued complaint are true.[5] Accordingly, we grant the General Counsel's Motion for Default Judgment.

We deny the Respondent's motion to stay the proceeding, finding that, notwithstanding the Respondent's possible financial difficulties, it has not presented sufficient reasons to warrant staying this settlement proceeding. In this regard, we note that the Respondent failed to meet the original deadline for the payments, failed to meet the extended deadline, refused to complete a financial questionnaire supplied by the Region, and failed to respond to the Region's requests on June 10 and 22 for a financial statement that it had earlier said would be forthcoming. It is clear that the Region has repeatedly attempted to work with the Respondent to address its COVID-19-related financial concerns, but the Respondent has failed to act in a manner commensurate with a good-faith effort to reach an accommodation. Moreover, unlike several cases cited by the Respondent, the parties here are not engaged in ongoing litigation in this matter; rather, the settlement agreement has been approved, and the Respondent is bound to comply with its terms. Further, contrary to the Respondent's contention that no party will be prejudiced by a stay, the discriminatees will experience a significant delay in receiving their backpay if a stay is granted. For the above reasons, the Respondent's request for a stay is denied.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Contractors, a Florida limited liability company, and Respondent Electric, a Florida limited liability company, have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have had interrelated operations; and have held themselves out to the public as a single-integrated business enterprise.

At all material times, based on the operations and conduct described above, Respondent Contractors and Respondent Electric constituted a single-integrated business enterprise and a single employer.

At all material times since on or about November 9, 2018, the Respondent has had an office and place of business located at 401 E. Jackson Street, Suite 3300, Tampa, Florida; at all material times until on or about November 9, 2018, the Respondent had an office and place of business located at 1717 E. 9th Avenue, Tampa, Florida; and at all material times the Respondent has been engaged in providing commercial and residential electrical services.

During the 12 months preceding the issuance of the complaint, in conducting its business operations described above, the Respondent provided services valued in excess of $50,000 to Petco Animal Supplies, Inc., Tampa International Airport, and other enterprises at locations in the state of Florida, each of which other enterprises is directly engaged in interstate commerce.

During the 12 months preceding the issuance of the complaint, in conducting its business operations described above, the Respondent purchased and caused to be transported and delivered to its work locations in the State of Florida, goods valued in excess of $50,000 directly from points outside the State of Florida and from other enterprises located within the State of Florida, each of which other enterprises had received the goods directly from points outside the State of Florida.

We find that Respondent Contractors is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[5] See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

We find that Respondent Electric is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Florida West Coast Chapter, National Electrical Contractors Association, Inc. (the Association) has been an organization composed of various employers engaged in the business of providing electrical services, one purpose of which is to represent its employer members in negotiating and administering collective-bargaining agreements with International Brotherhood of Electrical Workers, AFL–CIO, and its local unions, including the Union.

At all material times, the Respondent has been an employer-member of the Association and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with the Union.

We find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Victoria Bui	Project Manager
Anthony Italiano	Chief Executive Officer
Joanne Italiano	Chief Financial Officer

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Apprentice Wiremen, Journeyman Wiremen, Journeyman Technicians, Foremen, and General Foremen.

About February 6, 2018, the Respondent, an employer engaged in the building and construction industry, entered into a Letter of Assent whereby it agreed to be bound by current and future "inside" collective-bargaining agreements between the Union and the Association.

By entering into the agreement described above, the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.

About November 22, 2018, the Association entered into a collective-bargaining agreement with the Union that is effective by its terms from December 1, 2017, to November 30, 2019, recognizing the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.

Since about February 6, 2018, and at all material times, the Respondent has been a member of the Association and thereby agreed to recognize the Union and be bound by the agreement described above.

The Respondent engaged in the following conduct:

1. About May 31, 2019, the Respondent, by Anthony Italiano, at the Respondent's job site at Tampa International Airport, Tampa, Florida:

(a) Threatened to discharge employees unless they worked without the Union as their collective-bargaining representative.

(b) Promised employees wage increases if they agreed to continue working for the Respondent without the Union as their bargaining representative.

2. (a) By engaging in the conduct described above in paragraphs 1(a) and (b), about May 31, 2019, the Respondent caused the discharge of its employees Edward Polo De Castro and Terry Higgins.

(b) The Respondent engaged in the conduct described above in paragraphs 1(a), (b), and 2(a), because Edward Polo De Castro and Terry Higgins joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1(a) and (b), the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described in paragraphs 2(a) and (b), the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to comply with the unmet terms of the settlement agreement approved by the Regional Director for Region 12 on February 24. Accordingly, we shall order the Respondent to make Edward Polo De Castro and Terry Higgins whole by the payment of backpay, interest, and compensation for excess tax liability in the amounts set forth in the

settlement agreement, plus additional interest and compensation for excess tax liability accrued to the date of payment.[6] We shall also order the Respondent to make Edward Polo De Castro and Terry Higgins whole by payment of the principal, interest, and liquidated damages amounts for the Union's Pension-Annuity Fund set forth in the settlement agreement, plus additional interest and liquidated damages accrued to the date of payment. The additional interest on backpay and on Pension-Annuity Fund principal amounts to the date of payment should be computed at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Finally, we shall order the Respondent to file with the Regional Director for Region 12, within 21 days, a report allocating the backpay award to the appropriate calendar year(s) for each employee in accordance with *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016).

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the settlement agreement to seek "a full remedy for the violations found as is appropriate to remedy such violations."[7] However, in his Motion for Default Judgment, the General Counsel has not sought such additional remedies, and we will not, sua sponte, include them.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Sebsen Electrical Contractors LLC and Sebsen Electric LLC, Tampa, Florida, a single employer, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Make whole Edward Polo De Castro and Terry Higgins by payment of the backpay, interest, and compensation for excess tax liability in the amounts set forth in the settlement agreement, with additional interest and excess tax liability accrued to the date of payment. The total amount due under the settlement agreement, before additional interest and excess tax liability are calculated, is $22,146.

2. Make whole Edward Polo De Castro and Terry Higgins by payment of the principal, interest, and liquidated damages amounts for the Union's Pension-Annuity Fund set forth in the settlement agreement, with additional interest and liquidated damages accrued to the date of payment. The total amount due under the settlement agreement, before additional interest and damages are calculated, is $6,028.60.

3. Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

4. Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2020

Marvin E. Kaplan, Member

William J. Emanuel Member

Lauren McFerran Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] See *Opal Care LLC and Ruby Care LLC d/b/a Emerald Nursing & Rehabilitation Center*, 368 NLRB No. 103, slip op. at 3 (2019); *TR & SNF, Inc. d/b/a The Nursing Center at University Village*, 367 NLRB No. 43, slip op. at 3 (2018); *Performance Cleaning Group*, 360 NLRB No. 99, slip op. at 3 (2014)(not reported in Board volumes).

[7] As set forth above, the settlement agreement provided that, in case of noncompliance, the Board may issue such a full remedy.

[8] See, e.g., *Benchmark Mechanical, Inc*., 348 NLRB 576 (2006). The General Counsel specifically requested in his motion for default judgment that the Board order the Respondent to "comply with the terms of the Settlement Agreement," and to make Polo De Castro and Higgins whole by paying the amounts "set forth in the Settlement Agreement." In these circumstances, we construe the General Counsel's motion as a request to enforce the unmet terms of the settlement agreement, and not as a request for a "full remedy." See *Opal Care*, 368 NLRB No. 103, slip op. at 3 fn. 5; *Semper Fi Plumbing & Heating, Inc.*, 367 NLRB No. 98, slip op. at 3 fn. 10 (2019).